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In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE SACRAMENTO VALLEY CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., HAROLD E. NUTTER, INC., ROYAL ELECTRIC, INC., ALBERT SCHOUX AND JAMES K. (TED) CHOATE AS AMICI CURIAE AND CHARGING PARTIES BEFORE THE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF THE PETITIONER

MARK R. THIERMAN
Thierman, Simpson & Cook
550 California Street
North Building, Suite 600
San Francisco, CA 94104
(415) 434-4672

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This brief in support of Petitioner National Labor Relations Board is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Charles Fried, Solicitor General of the United States, Counsel for Petitioner and Lawrence Gold, counsel for Respondent. Letters of Consent from both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

The Sacramento Valley Chapter of National Electrical Contractors Association (NECA) is a multi-employer bargaining group comprised of electrical contractors working in and around the area of Sacramento, California. NECA has a long and sordid bargaining history with Respondent International Brotherhood of Electrical Workers, Local 340 (hereinafter referred to as the "Union" or "IBEW Local 340"). As a direct result of a dispute between NECA and Respondent, the Union fined Albert Schoux and James K. "Ted" Choate who were found to be potential and actual grievance adjustment and collective bargaining representatives of their respective employers, Royal Electric Company (hereinafter referred to as "Royal") and Harold E. Nutter Electric, Inc. (hereinafter referred to as "Nutter"). Therefore, Schoux, Choate, Royal, Nutter and NECA, the multi-employer bargaining group representative, each have a direct interest in the outcome of this case and ask to file this brief jointly as Amici Curiae. Amici also has knowledge of additional facts of which this Court should be aware. Amici submits this brief to apprise the Court of the full factual backdrop of this case.

SUMMARY OF ARGUMENT

Congress intended Section 8(b)(1)(B) of the National Labor Relations Act of 1947 as amended, 29 USC 158(b)(1)(B) (hereinafter referred to as the "Act" or the "NLRA") to protect employers from coercion in the selection of their bargaining representatives and to prevent employers from being pressured to join or resign from multi-employer groups. The National Labor Relations Board has developed reasonable standards for determining when Section 8(b)(1)(B) has been violated. The United States Court of Appeals for the Ninth Circuit refuses to follow those standards but insists upon an inquiry into union recognitional intent. Consideration of all the facts of this case reveals that the United States Court of Appeals for the Ninth Circuit's approach to implementing Section 8(b)(1)(B) is neither rationally derived from the statutory language, nor the Congressional intent behind Section 8(b)(1)(B). The three part test of the Ninth Circuit Court of Appeals is too illusive to be of practical value in labor disputes generally, and should not be adopted by this Court.

BACKGROUND

At the heart of this case is a labor dispute, a genuine struggle of real significance between actual people. NECA represents almost all the electrical contractors in the Sacramento area for collective bargaining purposes. Before 1981, the Union represented approximately 700 employees, most of whom worked for NECA member contractors. After 1981, and continuing to date, the National Association of Independent Unions ("NAIU") represents about 400 electricians working for these same contractors. The labor dispute in this case concerns the change in bargaining representative of approximately 400 electrical workers from IBEW Local 340 to NAIU.

NECA's bargaining relationship with the Union began almost 40 years ago and ended abruptly on September 15, 1981. In June of 1981, the then current contract between NECA and the Union expired and negotiations began. After negotiations failed to produce a new contract, the Union undertook a strike that lasted several months. The strike generated considerable litigation and finally ended when the Union sent NECA a

letter disclaiming any interest in representing the employees of NECA members. A copy of this September 15th letter of disclaimer is reprinted at Decision of the Administrative Law Judge, 271 NLRB at 996, Petition For A Writ of Certiorari at 12A.

The September 15th disclaimer letter did not mean the Union was going out of the business of representing electrical workers in the Sacramento area. When the Union could not settle with NECA, it decided to by-pass the employers' chosen bargaining representative, fragment the unit and bargain with the employers on an individual basis. Ten days after sending the disclaimer letter, the Union filed seventeen representation petitions in individual employer units. *See, Arden Electric*, 263 NLRB 318, 110 LRRM 1529 (1982), 275 NLRB No. 95, 119 LRRM, 1161 (1985). As dissenting members Jenkins and Hunter concluded in *Arden Electric*:

> The Board cannot, consistent with the line of cases outlined above, permit the Petitioner to succeed in this blatant attempt to whipsaw the unit. As the Petitioner's attempted withdrawal was untimely for the purpose of fragmenting the unit, we would affirm the Regional Director's administrative dismissal of the petitions.

Arden Electric, 263 NLRB at 319.

On October 1, 1981, NECA entered into a pre-hire contract with the NAIU, a rival labor organization. Because NECA's contract with the NAIU foiled the Union's plan to whipsaw the multi-employer bargaining unit, the Union launched extensive litigation in a variety of forums to crush the competing NECA/NAIU bargaining unit and/or to break off individual contractors "friendly" to the Union. NECA defended itself and continued to work with the NAIU, reaching several successive bargaining contracts over the five years since 1981. In *Grason Electric*, NLRB Case No. 20-CA-16872/JD-(SF)-190-83 (*filed* Jan. 28, 1982), Judge Pollack dismissed charges that Nutter and other NECA members unlawfully recognized the NAIU in the overall multi-employer unit. The *Grason* case is still pending as is much of the other litigation between the parties mentioned herein.

A. Proceedings In State Court

On June 25, 1981, three months prior to the signing of the contract between NECA and the NAIU, the Union launched its first legal attack with a state court action in Sacramento County Superior Court entitled *Frith v. Sacramento Valley Chapter, National*

Electrical Contractors Association, No. 297018 (California Superior Court for the County of Sacramento, *filed* June 25, 1981). The Union claimed that NECA had defamed the Union in a newspaper advertisement during the strike. This suit is still pending.

B. Proceedings Before The NLRB

The Union responded to the contract between NECA and the NAIU by filing a charge with the NLRB alleging that the collective bargaining agreement with the NAIU was illegal under Section 8(a)(1) and (2) of the Act. In essence, the Union asserted that NECA had unlawfully assisted the NAIU. After a full administrative hearing on August 31, 1983, NLRB Administrative Law Judge Jay Pollack found that NECA had engaged in an unfair labor practice by executing a collective bargaining agreement at a time when there was a question concerning representation only with respect to two small employers but *not* with respect to Nutter or the larger multi-employer group (which included Royal). One of these two small employers went out of business and the other voluntarily re-signed with IBEW Local 340, effectively mooting the case before a

final NLRB decision was rendered. Other than certain *de minimus* violations relating to dues deductions, the Administrative Law Judge dismissed the entire remainder of the Union's charges. The NLRB found no pre-contract assistance or domination. *Grason Electric, supra*. Exceptions to this order were filed by both the Union and NECA and the case is still pending. 1/

In another case, NECA was also forced to seek relief before the NLRB when the Union intentionally withheld supervisors from NECA members. In *Hulse Electric*, 273 NLRB 428, 118 LRRM 1604 (1984), Administrative Law Judge Pollack found that the Union had violated 8(b)(1)(B). *Hulse Electric* involved supervisory and non-supervisory employees of other NECA members who were fined by IBEW Local 340 for working during the 1981 strike. All the NLRB cases involving NECA and IBEW 340 were heard by Judge Pollack, who wrote the underlying opinion in this case as well.

1/ By letter dated October 9, 1986 to the NLRB Regional Attorney, the Union's Attorney sought dismissal of the *Grason* case. A copy of this letter is attached as Appendix A.

C. Proceedings In The Federal Courts

Faced with the severe economic harm wrought by the Union's strike for allegedly illegal contract clauses, NECA sought damages under Section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187. *Sacramento Valley Chapter of the National Electrical Contractors Association v. International Brotherhood of Electrical Workers*, No. S-81-480 LKK, *portions reported at* 632 F.Supp. 1403 *and* 637 F.Supp. 1417 (E.D.Cal. 1986). The Union responded to this Section 303 action by filing a counterclaim in the consolidated cases of *Sacramento Area Electrical Workers Health & Welfare, Vacation & Pension Trust Funds v. Cal-Neva Electric, Inc.*, No. S-82-912 RAR, and *Sacramento Area Electrical Workers Health & Welfare, Vacation & Pension Trust Funds v. Tonelli Electric, Inc.*, No. 82-913 RAR, 99 Labor Cases (CCH) ¶10,649 (E.D. Cal. 1982), against a number of defendants, including NECA and the NAIU. The Union alleged violations of Section 302 of the LMRA, 29 U.S.C. § 186. Just as it did in the NLRB's *Grason* case, the Union again claimed that assistance had been given by NECA to the NAIU in return for a

"sweetheart" deal. On December 3, 1982, Judge Ramirez of the United States District Court for the Eastern District of California dismissed those complaints as "wholly preempted" by Section 8(a)(2) of the NLRA.

Undaunted, the Union next sought to re-cast its claim in the form of a violation of the antitrust laws and filed an antitrust counterclaim against NECA, Nutter and other NECA employer members in the above-mentioned Section 303 action. The Union's counter-claim was dismissed in its entirety as the court recognized it was nothing more than an "effort to redress the litigation posture, [for] unions have recently sought to find some ground upon which to cross-complain" in order to obtain leverage in settlement. *NECA v. IBEW, Local 340, supra*, 632 F.Supp at 1407. The dismissal was denominated as final pursuant to Federal Rules of Civil Procedure 59(b). *Id.* at 1414. The Union has appealed the dismissal to the United States Court of Appeals for the Ninth Circuit, Docket No. 86-2026.

After the failure of the antitrust action, the Union brought the same claim for the third time as a violation of the anti-racketeering statute. *International*

Brotherhood of Electrical Workers, Local 340 v. Mark R. Thierman, Sacramento Chapter of the National Electrical Contractors Association, et al., No. S-86-0881 LKK/JFM (E.D. Cal. *filed* July 23, 1986). The Union alleged the same "sweetheart" contract as a conspiracy to violate the Section 302 of the Act. The named conspirators are NECA, Nutter, its attorneys and serveral other NECA employer members. A motion to dismiss has been filed and is still pending in the United States District Court for the Eastern District of California. On the first page of the Union's Opposition to Defendant's Motion to Dismiss this action, dated November 7, 1986, IBEW Local 340 reveals, in no uncertain terms, its intentions in the Sacramento area:

> Since October 1981, these employers and the NAIU have negotiated 'sweetheart' contracts as part of a grand scheme of the employers to use the disguise of a legitimate labor union to claim that they were bound to a legitimate, arms-length collective bargaining agreement in the Sacramento area. In this manner, these employers could use this disguise as a sword to injure I.B.E.W. Local 340 and its members, as well as a shield to blunt any efforts by I.B.E.W. Local 340 *to organize the employees of the employers* or to sign individual collective bargaining agreements with one or more of these employers.

Brief of Plaintiff at 1, Case No. S-86-0881 LKK/JFM (E.D. Cal., July 23, 1986)(Emphasis added.)

In the Court of Appeals for the Ninth Circuit there is still pending a decision in the case of *Lud Larson, et al. v. Ken Carlson, et al., appeal docketed* No. 83-3359 (9th Cir., Aug. 31, 1986) on appeal from the United States District Court for the Eastern District of California, Civil Action No. S-83-385 EDP. This case involves the confirmation of an arbitration award dividing assets of the former NECA-IBEW Joint Apprenticeship Training Trust Fund between the IBEW Local 340/Sacramento Area Electrical Contractors Association ("SECA") Joint Apprenticeship Training Committee and the NECA/NAIU Joint Apprenticeship Training Committee. 2/ NLRB Administrative Law Judge Pollack was also made aware of the arbitration between the NECA trustees and IBEW Local 340 trustees arising out of the

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2/ As predicted in the testimony of IBEW 340 Business Agent Lee Frith before Administrative Law Judge Pollack, a "new" multi-employer association was created by IBEW Local 340 and former NECA contractors working in the area and named the Sacramento Area Electrical Contractors Association (SECA).

events of the strike in 1981. This arbitration is reported at 3 Employee Benefit Cases 2469 (1982). Royal and Nutter are both contributing employers to the NECA/NAIU trusts and were contributors to the IBEW Local 340/NECA trusts before their termination. At all times relevant herein, Royal and Nutter were represented by NECA and/or NECA management trustees in all labor relations and/or Trust Fund matters.

D. The Posture Of The Parties

The Sacramento electrical industry is torn between two factions, NECA/NAIU and IBEW/SECA. Each group is trying to pull employees into its respective camp. Each is using every means available to finesse itself into a slightly better position than the other. To say that one or the other does not "intend" to represent all the electrical workers in the area ignores reality. Each intends to represent all the electricians, and thereby put the other faction out of business or each intends to eliminate the other from competition and therby represent all the electricians in the Sacramento area.

ARGUMENT

A. A Union's "Intent To Represent" Is An Improper Test To Determine If 8(b)(1)(B) Has Been Violated

Congress has sought to create a uniform labor policy throughout this country. Administrative agencies serve Congress in developing and implementing a cohesive national labor policy pursuant to specific legislative acts. Because the NLRB was created to achieve this goal in the private sector, judicial review of its policy decisions and statutory interpretations should be strictly limited. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2467, 57 L.Ed.2d 370 (1978). Only if the NLRB's statutory construction is unreasonable, should enforcement be denied. The primary jurisdiction for labor relations under the National Labor Relations Act lies with the NLRB and not the Court of Appeals. If the NLR3's construction of the Act is "reasonably defensible, it should not be rejected merely because the court might prefer another view of the statute". *Ford Motor Co. v. NLRB*, 441 U.S. 488 at 497, 99 S.Ct. 1842 at 1849, 60 L.Ed.2d 420 at 428 (1979).

In Section 8(b)(1)(B) cases, the NLRB has formulated a two part test that is rationally derived from the language and the intent of the statute. The NLRB first determines if the employee subjected to some form of union pressure is a management representative. If the first element is satisfied, the NLRB inquires if the union pressure was coercive of the employer. If these two elements are met, the union pressure violates the Act. In the instant action, the NLRB concluded that both elements of the test were met. The United States Court of Appeals for the Ninth Circuit agreed that Choate and Schoux were management's collective bargaining representatives, and that the Union fines were coercive in the employer's selection of Choate and Schoux, but refused to enforce the NLRB's award.

The United States Court of Appeals for the Ninth Circuit has adopted the NLRB's two part test but has added a third element of its own creation. This "third" part to the test inquires "...whether the union demonstrated an intent to represent the employees of the nonsignatory employers ..." 780 F.2d at 1491. The United States Court of Appeals

for the Ninth Circuit requires the NLRB to prove the Union wishes to "represent" the employees of the employer when it fines supervisors for working for a "non-union" employer. This question is irrelevant to the language and purpose of Section 8(b)(1)(B).

The United States Court of Appeal for the Ninth Circuit first announced its new representational or recognitional "intent" inquiry in the decision of *NLRB v. IBEW Local 73 (Chewelah)*, 621 F.2d 1035, *modified* 714 F.2d 870 (1980). In *Chewelah*, the court considered a case factually similar to the instant case, where a union imposed a fine on a member who helped form and then went to work for a non-signatory company. The United States Court of Appeals for the Ninth Circuit reasoned that because the union had not manifested an intent to represent the employees of the new company, the fine was not intended to coerce an employer in the selection of its bargaining representatives. The NLRB refused to acquiesce and sought a Writ of Certiorari.

The fallacy of the holding in *Chewelah* is that it allows the union to do exactly that which the statute forbids. Section

8(b)(1)(B) says it shall be unlawful for a union to coerce an employer "... *in the selection* of its..." collective bargaining or grievance adjustment representative. By fining a supervisor who works for a non-union employer, the Union is attempting to coerce the employer (through the employee) to not select the Union trained employee as a supervisor. This action is coercive whether or not the union seeks representation. Although the statute does not mention the word "intent", the purpose of a union fine of a supervisor who works for a non-union employer is to influence that employer's selection of collective bargaining representative, and to force the employer to "go union" some day in order to obtain qualified union trained supervision. Why else would a union fine a supervisor member for working for a non-union employer?

The NLRB continues to reject the *Chewelah* "intent" inquiry. In *Local Union 497, International Brotherhood of Electrical Workers (Canyon Valley Electric)*, 281 NLRB No. 158, 123 LRRM 1160 (1986), the IBEW fined a supervisor for working for a non-signatory electrical contractor. In defense of the 8(b)(1)(B) charged leveled by the

NLRB, the IBEW relied on *Chewelah*, the governing law of the circuit in which the case arose. The IBEW argued that it neither has nor seeks a bargaining relationship with the supervisor's employer. The Board summarily rejected the *Chewelah* rationale. "Section 8(b)(1)(B) ... protects the freedom of employers to choose their representatives unimpeded by coercive union pressure *on the representatives* to cease working for them." 281 NLRB at ____, 123 LRRM at 1160 (emphasis added). Section 8(b)(1)(B) simply does not mention "recognition" as a prerequisite at all. In the instant case, the NLRB also dispensed with the Union's *Chewelah* argument as out of line with Supreme Court precedent.

The hard facts of life are that unions always seek eventually to represent all the employees in an area or an industry. Unions exist to organize the unorganized. *See, Carpenters Local Union No. 1622 (Paul E. Iacono Structural Engineer, Inc.)*, 250 NLRB 416 (1980). By denying non-union employers trained supervision, the Union hopes to induce the employers to sign an agreement. Especially in the construction industry where pre-hire agreements are lawful, control of selection of supervision is a

major factor in union organizing. In this case, IBEW Local 340 Business Agent Lee Frith testified that eventually the union wanted every electrical contractor in the Sacramento area signed to an IBEW 340 agreement. Decision of the Administrative Law Judge, 271 NLRB at 999, Petition For A Writ Of Certiorari at 33A. The Administrative Law Judge considered the fines illegal even under the United States Court of Appeals for the Ninth Circuit's test of Section 8(b)(1)(B).

The NLRB does not require a recognitional object because the statute does not require it. The NLRB has made a policy judgment about the nature and effect of such union fines upon the selection of supervisors. While a "recognitional object" exists *sub silentio* in all instances where a union fines a supervisor for working for a non-signatory employer, it would be unfair to the employer and its supervisors to be forced to prove the union's hidden agenda in each and every case.

The facts of this case demonstrate vividly that the NLRB's interpretation of Section 8(b)(1)(B) is correct. "The major concern of Congress [in enacting Section

8(b)(1)(B)] was to prevent unions from forcing employers into or out of multi-employer bargaining units". *Chewelah* 621 F.2d at 1036 citing *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790, 803, 94 S.Ct. 2737, 2743, 41 L.Ed.2d 477 (1974).

In the instant case, the Union insisted to impasse on allegedly illegal topics of bargaining and then, rather than drop its bargaining demands "disclaimed interest" in representing the employees of the employers of the multi-employer association. Decision of the Administrative Law Judge, 271 NLRB at 999. Both Nutter Electric and Royal Electric were NECA bargaining unit members. At the same time, the union filed selective individual petitions for representation in single employer units, with the expressed desire of forcing all the employers out of the multi-employer association and eventually into a new, union dominated association, Petition For A Writ of Certiorari at 33A. As the union's attorney wrote:

> Although I was not asked to express an opinion as to the wisdom of disclaiming interest, it is my opinion that it was a realistic move to make considering the tactics employed by NECA [assisting its members in hiring replacement employees] and the possibility that the disclaimer

> would prompt the good contractors into action. I further advised Brother Frith [Business Agent for the Union] that the disclaimer would permit the individual employers to grant recognition to Local 340 on an individual basis and to bargain on a single employer basis.

Decision of the Administrative Law Judge, 271 NLRB at 999, Petition For A Writ Of Certiorari at 24A.

This case epitomizes the legislative intent behind Section 8(b)(1)(B). Because Nutter and Royal remained loyal to the multi-employer group (NECA) and signed a contract with a competitor union (the NAIU), IBEW Local 340 sought to deprive these employers of their union trained supervision. 3/ As the Administrative Law Judge continues:

> In the instant hearing [Union Business Agent] Frith, called as an adverse witness by counsel for Nutter Electric and Royal Electric, testified

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3/ Judge Pollack adopting his conclusion from *Hulse*, stated,

> "In that case, I found that the Union intended to withhold supervision in order to force the employers to come back to the union. The union would then be in a position to bargain with the employers on an individual basis rather than on a NECA multi-employer basis."

Decision of the Administrative Law Judge 271, NLRB at 1000, Petition For A Writ Of Certiorari at 33A.

> that after the disclaimer it was his intention to organize every electrical contractor that was willing to sign an agreement with the Union. Frith further testified that it was the Union's first concern to organize the 17 employers for which petitions were filed and get an agreement and an association established before any plans were made to organize the other employers. According to Frith, after a new association was formed with the 17 employers, any other employer that was willing to become a part of the new organization would be welcome. Frith testified "ultimately down the road it was our hope that everybody would be back under an agreement.

Decision of the Administrative Law Judge, 271 NLRB at 999, Petition For A Writ Of Certiorari at 24A.

The United States Court of Appeals for the Eleventh Circuit correctly supports the NLRB's reasoning in these kinds of cases. In *National Labor Relations Board v. International Brotherhood of Electrical Workers (Willey)*, 703 F.2d 501, 113 LRRM 2226 (11th Cir., 1983) the court expressly rejected *Chewelah*. The court in *Willey* reasoned that "[p]lacing the emphasis on the effect caused by union's actions, rather than its intent, is more consistent with the fundamental purposes of the statute." *Willey*, 703 F.2d at 5067. As an organization, the union must be presumed to "intend" the logical result of its actions. Subjective, individual "intent" is just not

appropriate to analyzing the behavior of a large collective organization.

This Court also focuses on the affect of the action rather than the union's intent. "[The Board] may -- indeed, it must -- inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to §8(b)(1)(B)." *American Broadcasting Co. v. Writer's Guild of America, West, Inc.*, 437 U.S. 411 at 430, 98 S.Ct. 2423 at 2434, 57 L.Ed.2d 313 at 328 (1978) *and see Florida Power and Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790 at 804-805, 94 S.Ct. 2737 at 2744-45, 41 L.Ed.2d 477 at 488 (1974). But the "intent" of the union must be presumed from the obvious result of its action and is totally irrelevant to meaningful application of the Act.

B. Intent Is Too Illusive A Touchstone To Be Used Here.

Despite overwhelming factual indications that the Union was attempting to deprive Nutter and Royal of union-trained supervision in an effort to force these

employers out of the NECA multi-employer bargaining group and into bargaining on a single employer or a new multi-employer group basis, the United States Court of Appeal for the Ninth Circuit found that the Administrative Law Judge "did not have sufficient evidence to support his conclusion about the Union's intent to represent" (780 F.2d at 1493). If the evidence of intent to influence the bargaining representative in this case does not support the ALJ's finding as reasonable, no finding of intent will ever be reasonable to prove an 8(b)(1)(B) violation. In the real world, business agents never actually admit an 8(b)(1)(B) "recognitional" intent. The Administrative Law Judge perceived ample evidence of intent here. The United States Court of Appeal for the Ninth Circuit's contrary finding demonstrates that intent of a "recognitional" object is not the proper standard in an 8(b)(1)(B) context.

Pointing to the *Hulse*, *Grason* and *Arden* cases and the testimony of Lee Frith, the ALJ found that the Union continued in its desire to influence the collective bargaining representative of the employers of the NECA multi-employer association, "albeit not

in the NECA multi-employer unit." Decision of the Administrative Law Judge, 271 NLRB at 1002, Petition For A Writ of Certiorari at 33A. Deference should be given to the Adminestrative Law Judge on all factual inferences. An administrative law judge hearing live testimony may reasonably find that the requisite intent is present. An appeals court without the aid of weighing credibility by witness demeanor or other non-verbal signs is not really in a position to judge such an illusive quality as "intent". Under these circumstances, the trier of fact's determination of intent as an issue of fact should be virtually non-reviewable. By reversing the finding of fact of Administrative Law Judge Pollack in such an obvious case as this one, the United States Court of Appeals for Ninth Circuit demonstrates conclusively that inquiry into the Union's "recognitional intent" is an unworkable standard for administering Section 8(b)(1)(b) of the Act.

CONCLUSION

The National Labor Relations Board has adopted a sound policy in its field of expertise by not requiring a "recognitional object" in proving an 8(b)(1)(B) violation.

This policy is initially derived from the statute and shaped through actual administration in the field. The paramount Congressional concern for establishing a uniform nationwide labor policy, administered primarily by the National Labor Relations Board, requires Court of Appeals to enforce an NLRB award that is not inconsistent with a rationale interpretation of statutory authority.

The full story behind this case reveals a clear intent by the Union to represent the employees of all NECA employers but not in the NECA multi-employer bargaining unit. Congress intended Section 8(b)(1)(B) to protect employers from being coerced in the selection of their bargaining representatives, especially when that pressure is designed to force the employer either into or out of multi-employer groups. In this case, the fines were part of an overall strategy to force the "good" employers out of NECA and "to bargain on a single employer basis".

The United States Court of Appeals for the Ninth Circuit failed to find substantial evidence of a "recognitional" intent because the nature of an intent inquiry is too

illusive to be practical. The "intent" of fining a supervisor member who works for a non-signatory employer is to influence the selection of that employer's supervisors and to force the employer to become signatory. While IBEW Local 340's attorneys deny any "recognitional" object before the NLRB, IBEW Local 340 seeks to upset the NECA-NAIU contract in lower courts and "to organize the employees of these employers or to sign individual bargaining agreements with one or more of these employers". IBEW Local 340's Brief In Opposition to Motion to Dismiss dated November 7, 1986 in *IBEW Local 340 v. Thierman, et al., supra.* Amici respectfully submit that the decision of the United States Court of Appeals for the Ninth Circuit should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

Mark R. Thierman

Attorney for Amicus Curiae and Charging Parties before the National Labor Relations Board

APPENDIX A

October 9, 1986

Robert H. Miller
Regional Director
Region 20
National Labor Relations Board
450 Golden Gate Ave., Box 36047
San Francisco, CA 94102

Re: Grason Electric
Case No. 20-CA-16872

Dear Mr. Miller:

On behalf of IBEW Local 340, the charging party in the above referenced case, I hereby request that Region 20, as Counsel for the General Counsel, join with IBEW Local 340 in a motion to the Board to permit withdrawal of the unfair labor practice charge(s), followed by the withdrawal of the complaint and the discontinuance of this action. This motion will be made on the basis that the relief provided by the Board's ruling in Arden Electric, et al., 275 NLRB No. 95, 119 LRRM 1161 (June 4, 1985) has essentially mooted the Grason Electric case.

The decision in Arden reversed the Acting Regional Director's 29 December 1981 dismissal of IBEW Local 340's seventeen representation petitions filed on 25 September 1981. These petitions were

remanded to the Regional Director for further appropriate action.

This further appropriate action consisted of obtaining stipulations for elections, and/or holding additional hearings followed by the direction and conducting of elections. Only recently, the last of these seventeen representation petitions was finally processed through to conclusion. Although IBEW Local 340 has been denied timely justice in this case and the employees have been denied the right, since 1981, to freely express their choice concerning representation, what's done is done. There is nothing more to be gained in spending further time and money litigating the Grason case.

Counsel for the General Counsel chose only to litigate the complaint in Grason on the limited theory of Midwest Piping and Supply Co., 63 NLRB 1060 (1945), as modified in Abraham Grossman d/b/a Bruckner Nursing Home, 262 NLRB No. 115 (1982) and RCA del Caribe, Inc., 262 NLRB No. 116 (1982). This approach was taken, despite the fact that the unfair labor practice charge encompassed the 8(a)(2) allegation of unlawful domination and recognition of the

NAIU under circumstances not privileged by Section 8(f) of the Act. Although ample evidence substantiating this charge was available, and additional proof incidentally developed at the hearings, IBEW Local 340 was precluded from seeking to void the NAIU contract with NECA on this theory.

Because I do not have confidence that the theory advanced by the Counsel for the General Counsel at the Grason hearings will result in voiding the unlawful NECA-NAIU contract except as to the seventeen petitioned for employers, and since this voiding has already occurred as part of the Arden decision, I see no purpose to be served in continuing the Grason litigation.

If you agree with this request, please contact me immediately so that the necessary steps can be taken to cancel the Grason proceedings. I will assume that such a motion must come from the Counsel for the General Counsel, as he/she is invested with the prosecutorial discretion and control over this case. IBEW Local 340 will join/consent in this motion.

Very truly yours,

WYLIE, BLUNT, McBRIDE,
JESINGER & SURE
/s/
By Robert E. Jesinger